

STATE OF MICHIGAN
COURT OF APPEALS

DEBORAH TRIPLETT,

Plaintiff-Appellant,

v

K-MART CORPORATION,

Defendant-Appellee.

UNPUBLISHED

August 22, 1997

No. 195125

Macomb Circuit Court

LC No. 95-003117-NO

Before: Sawyer, P.J., and Bandstra and E. A. Quinnell*, JJ.

MEMORANDUM.

Plaintiff appeals by right summary disposition under MCR 2.116(C)(10), after the close of discovery, in this premises liability action. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff contends that there were unresolved factual issues warranting jury resolution. Her brief includes photographs and other references to documents which were never presented to the trial court prior to its ruling on defendant's motion for summary disposition. In reviewing the propriety of the trial court's grant of defendant's motion for summary disposition, this Court has considered only the materials on file with the trial court at the time of that ruling. *Quinto v Cross & Peters*, 451 Mich 358, 367 n 5; 547 NW2d 314 (1996). Similarly, to the extent plaintiff's deposition testimony contradicts her affidavit, her deposition testimony has been treated as controlling. *Gamet v Jenks*, 38 Mich App 719, 726; 197 NW2d 160 (1972).

Given the nature of defendant's automotive service division, an ordinary invitee in plaintiff's position should have expected to encounter grease, oil, or similar substances and accordingly, in the exercise of due care for personal safety, should have been on the lookout for such substances. *Novotney v Burger King (On Remand)*, 198 Mich App 470, 476; 499 NW2d 379 (1993). Plaintiff's deposition testimony indicated that she failed to exercise such due care, but that does not render the danger less than open and obvious under the circumstances. *Bertrand v Alan Ford, Inc.*, 449 Mich 606, 621; 537 NW2d 185 (1995).

* Circuit judge, sitting on the Court of Appeals by assignment.

Given the openness and obviousness of the danger, the hazard that existed was not unreasonable. *Id.*, 449 Mich at 614. This was not a situation in which the only way a customer could gain access to the customer service area of the automotive service department was through the actual service area. Cf. Restatement Torts, 2d, § 343A, Illustration 5, and note that § 343A was confirmed as applying in Michigan in *Bertrand*, 449 Mich at 612 ff. This was a situation in which the possessor of land could reasonably assume that the invitee would protect herself by the exercise of ordinary care, knowing the actual conditions and the activities carried on and the dangers involved, being free for herself to make an intelligent choice as to whether the advantage to be gained was sufficient to justify her in incurring the risk by entering or remaining on that portion of defendant's land. Section 343A, comment e.

Affirmed.

/s/ David H. Sawyer

/s/ Richard A. Bandstra

/s/ Edward A. Quinnell